

SUNNY TAY THIAM CHIN

a

v.

TAY LEY ENG

HIGH COURT MALAYA, JOHOR BAHRU

b

ABDUL MALIK ISHAK J

[ORIGINATING SUMMONS NO: 24-755-1995]

2 JANUARY 1996

CIVIL PROCEDURE: *Judgments and orders - Consent order - Whether plaintiff sought to vary terms of consent order*

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The plaintiff petitioned for divorce and the marriage was dissolved by a consent order of the court. In the negotiations that led to the consent order, the parties arrived at a settlement in relation to the proceeds of the sale of the matrimonial house. It was agreed that both parties would be entitled to half-share each of the balance of the proceeds of the sale of the house after various deductions had been made to reimburse loans taken pertaining to its purchase. Subsequently, when the plaintiff sought to deduct from the defendant's half-share, the sum that the defendant utilised through the use of the plaintiff's visa supplementary card, the defendant threatened contempt proceedings for going against the consent order of the court.

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In this instance, the plaintiff sought declaratory reliefs to ascertain his rights under the consent order and whether he could deduct the latter sum.

Held:

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[1] An order by consent is evidence of the contract between the parties and is binding on all parties to the said order. However, an aggrieved party to that consent order may seek a declaration from the court to ascertain his rights and obligations under that consent order.

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[2] The plaintiff affected by the consent order desired not to have it quashed but on the contrary to ascertain that it was valid and to find out what exactly were his rights under the said order, which might be obtained by way of a declaration. Though the power of the court to make a declaratory order is unlimited in its scope, yet it is entirely discretionary in nature. The relief sought for by the plaintiff was properly drafted and was rightly asked for.

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[Relief granted.]

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a Case(s) referred to:

Barber v. Manchester Regional Hospital Board [1958] 1 WLR 181 (*refd*)
Burr v. Anglo-French Banking Corporation Ltd [1933] 49 TLR 405 (*refd*)
Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia & Anor [1979] 2 MLJ 101 (*refd*)

b *Dyson v. Attorney-General* [1911] 1 KB 410 (*refd*)
Ellerman Lines Ltd v. Read [1927] 44 TLR 7 (*refd*)
Ganapathy Chettiar v. Lum Kum Chum & Ors [1980] 2 MLJ 145 (*refd*)
Guaranty Trust Co v. Hannay [1915] 2 KB 536 (*refd*)
Hanson v. Radcliffe UDC [1922] 2 Ch 507 (*refd*)
Ibeneweka v. Egbuna [1964] 1 WLR 219 (*refd*)

c *Johns v. Chatalos* [1973] 3 All ER 410 (*refd*)
Low Kum Yoon v. Teh Kim Huah [1979] 1 MLJ 83 (*refd*)
Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 (*refd*)
Pyx Granite Co Ltd v. Ministry of Housing & Local Government [1960] AC 260 (*refd*)
Re Bramblevale Ltd [1970] Law Reports 1 Ch 128 (*refd*)

d *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade* [1921] 2 AC 438 (*refd*)
The Regina d'Italia [1925] P 123 (*refd*)
Vine v. National Dock Labour Board [1957] AC 488 (*refd*)
Yukich v. Sinclair [1961] NZLR 752 (*refd*)

e For the plaintiff - John Looi; M/s Chor Pee Anwarul & Co
For the defendant - Mohamed Hanipa Maidin; M/s L Parthiban & Assoc

Reported by Usha Thiagarajah

JUDGMENT**f Abdul Malik Ishak J:**

g The plaintiff, a bank officer with Public Bank Berhad, lawfully married the defendant, a beauty adviser with Kose Cosmetic (M) Sdn Bhd, on 20 September 1980 at the Civil Registry of Marriages at the district of Timor Laut, Penang. They cohabitated at their matrimonial home known as no: 25, Jalan Anggerik 19, Taman Johor Jaya, 81100 Johor Bahru ("matrimonial home"). That marriage lasted for 12 years 8 months 5 days only and it was the plaintiff's case that the defendant was particularly abusive in the privacy of their bedroom which caused continuous grave distress to the plaintiff.

h It seemed that the plaintiff's low sperm count caused him to be ridiculed and taunted by the defendant. That low sperm count must be the root cause for their failure to sire a child. The plaintiff sought medical advice and was put on medication and subsequent tests proved that his sperm count had improved – yet the defendant failed to conceive a child. The defendant continued to ridicule the plaintiff to such an extent that the plaintiff was forced to leave

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the matrimonial home. The parties have lived apart for a continuous period of two years immediately preceding the presentation of the divorce petition by the plaintiff. In her affidavit in reply to the petition, the defendant deposed that her relationship with the plaintiff was strained due to the intolerable behaviour of the plaintiff. The defendant emphasised strongly her point to the effect that the plaintiff was adulterous in that he had an extra marital affair with another woman.

Finally, to cut the story short, on 25 May 1993 by consent a *decree nisi* for the dissolution of the marriage was ordered by James Foong J.

The matrimonial home was registered jointly in the names of the plaintiff and the defendant. To purchase the matrimonial home, the plaintiff resorted to:

- (a) borrowing RM10,000 from his father;
- (b) borrowing RM15,000 from his mother; and
- (c) obtaining a loan from his employer – the Public Bank Bhd in the sum of RM91,842.66 sen.

Since the plaintiff was and still is a bank officer with the Public Bank Bhd, monthly deductions were made at source from his salary slips. In the initial stage of negotiations that led to the consent order, the plaintiff sought to sell off the matrimonial home and the proceeds of that sale would be utilised to redeem Public Bank Bhd as well as to reimburse RM25,000 advanced by the plaintiff's parents together with the ancillary legal fees. The balance sums of the proceeds of sale of the matrimonial home after the deductions as mentioned above would then be equally shared between the plaintiff and the defendant. Unfortunately, this proposal was rejected by the defendant. After much quibbling, both parties arrived at a settlement. The defendant agreed that a sum of RM3,000 be deducted from her share as full and final settlement of RM25,000 as advanced to the plaintiff by the plaintiff's parents on the undertaking by the defendant to retract her claim against the plaintiff in regard to the sale of a motorcar JAS 3191. It transpired that the plaintiff sold that motorcar on the sly and pocketed the money leaving the defendant high and dry. Be that as it may, after the consent order had been extracted, the plaintiff frantically searched for a buyer of the matrimonial home. On 5 November 1993 the plaintiff succeeded in securing a buyer who was willing to pay at RM150,000 and the relevant documentations were then transmitted to the defendant for her signatures. The defendant purposely delayed in signing the sale and purchase agreement and the memorandum of transfer. This delay proved fatal. The matrimonial home remained unsold and the plaintiff had to service the loan to the Public Bank Bhd to prevent the latter from auctioning the matrimonial home. In the meantime, the plaintiff incurred expenses

- a* servicing the loan to the Public Bank Bhd after 25 May 1993, and this continued right through February 1994. The figure came to RM3,440. The plaintiff through his solicitors wrote a letter dated 27 April 1994 to the defendant's solicitors itemising the statement of accounts where the balance of the proceeds of the sale of the matrimonial home was listed at RM59,104.94
- b* sen. Out of this amount, the defendant's half share was said to be RM29,552.47 sen. Further deductions were made from the sum of RM29,552.47 sen and these deductions included:

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| <i>c</i> | (1) Deductions per item 5
of the Decree Nisi | ... RM3,000 |
| <i>d</i> | (2) Expenditure of SBB Visa account
by the defendant | ... RM1,594.74 |
| <i>e</i> | (3) Payments of housing loan instalments
for the period of May 1993 to
February 1994 (½ share) | ... RM1,720 |
| | | RM6,314.74 |
| | | ===== |

- e* Finally, the half share entitlement of the defendant came to RM23,237.73 and a cheque in that amount was remitted to the defendant's solicitors for onward transmission to the defendant.

- f* Now, in regard to the deduction of RM1,594.74 which represented the amount incurred by the defendant through the use of the plaintiff's visa supplementary card issued by Southern Bank Berhad, it was said that the defendant made the following purchases:

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| <i>g</i> | (a) 12 May 1990 | ... RM 97.44 |
| <i>h</i> | (b) 14 June 1990 | ... RM 58.65 |
| <i>i</i> | (c) 15 June 1990 | ... RM 43.05 |
| | (d) 10 September 1990 | ... RM1,309 |
| | (e) 26 June 1990 | ... RM 86.60 |
| | | RM1,594.74 |
| | | ===== |

On receipt of the letter dated 27 April 1994 as adverted to earlier, the defendant was hardly amused. The defendant refused to accept those deductions and threatened contempt proceedings against the plaintiff for going against the consent order dated 25 May 1993. Naturally, the plaintiff feared for his position; he was afraid that such a course of action would affect his career as an assistant manager of the Public Bank Bhd. The plaintiff must have been aware that: "A contempt of court is an offence of a criminal character. A man may be sent to prison for it" (per Lord Denning in *Re Bramblevale Ltd* [1970] Law Reports 1 Ch 128).

Without furtherado, the plaintiff filed an originating summons (encl. 3) and sought for the following declarations:

- (1) Bahawa dalam pentafsiran yang betul atas Dekri Nisi bertarikh 25.5.1993, pihak Defendan juga bertanggungjawab menanggung separuh dari bayaran ansuran bulanan untuk pinjaman bagi rumah kediaman suami isteri di No. 25, Jalan Anggerek 19, Taman Johor Jaya, 81100 Johor Bahru (rumah tersebut) kepada Public Bank Bhd dari tarikh Dekri Nisi sehingga tarikh pembayaran penuh dibuat kepada Public Bank Bhd iaitu 30.3.1994;
- (2) Bahawa dalam pentafsiran yang betul atas Dekri Nisi bertarikh 25.5.1993, pihak plaintif berhak untuk menolak sejumlah RM1,720.00 dari jumlah kepunyaan defendan selepas pembahagian wang jualan rumah tersebut;
- (3) Bahawa dalam pentafsiran yang betul atas Dekri Nisi bertarikh 25.5.1993, pihak plaintif berhak untuk menolak sejumlah RM1,594.74 yang merupakan perbelanjaan yang dibuat oleh pihak defendan dengan menggunakan kad visa tambahannya (tanpa kebenaran plaintif) dari jumlah kepunyaan defendan selepas pembahagian wang jualan rumah tersebut;
- (4) Sehingga tindakan ini diputuskan, pihak defendan dilarang dari memulakan atau meneruskan sebarang tindakan undang-undang termasuk prosiding komital terhadap pihak plaintif berkaitan dengan wang yang tersebut di atas; dan
- (5) Kos tindakan ini dan kos sampingannya dibayar ditetapkan dan dibayar oleh defendan kepada plaintif.

Mr. John Looi, the learned counsel for the plaintiff, argued that he was not seeking to vary the consent order dated 25 May 1993 but simply to obtain a declaration as to the rights of the parties under the consent order. It is Mr. John Looi's submission that the consent order was correctly construed by the plaintiff thereby enabling the plaintiff to make those deductions as set out in the early part of this judgment. Mr. Mohamed Hanipa bin Maidin, the learned counsel for the defendant, argued that the declaratory reliefs which the plaintiff sought was nothing more than a camouflage to disguise the true purpose of their originating summons and this was said to be an attempt to vary the consent order.

a It is germane at this juncture to reproduce item 5 of the consent order which is the subject of dispute:

5. That the proceeds of sale of the said property less the redemption sum due to M/s Public Bank Berhad the legal costs for redemption and disbursement ancillary thereto together with disbursements for the sale thereof, the valuation fees and brokerage fees of not more than 1%, if incurred, be paid to the parties in equal shares subject to the deduction of the sum of RM3,000.00 from the Respondent's share, which said sum of RM3,000.00 is to be paid to the Petitioner.

c Though "an order by consent is evidence of the contract between the parties and is binding on all the parties to the order" (per Raja Azian Shah CJ (Malaya) (as His Majesty then was) in *Ganapathy Chettiar v. Lum Kum Chum & Ors* [1980] 2 MLJ 145), yet an aggrieved party to that consent order may seek a declaration from this court to ascertain his rights and obligations under that consent order. Put differently, a declaration can be resorted to ascertain and determine the rights of the parties or to determine a point of law or as a substitution for an order of *certiorari* (*Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 FC; *Pyx Granite Co Ltd v. Ministry of Housing & Local Government* [1960] AC 260; [1959] 3 All ER 1 HL). The plaintiff here affected by the consent order desires not to have it quashed but on the contrary to ascertain that it is valid and to find out what exactly his rights under that consent order were. Thus, an authoritative determination of those matters as set out in encl. 3 may be obtained by way of a declaration. It is quite obvious that the plaintiff is not seeking an amendment of the consent order as envisaged in O. 20 r. 11 of the Rules of the High Court 1980. There was no clerical mistake or error arising from accidental slips or omissions in drawing up the consent order.

I now propose to examine some authorities where declarations have been granted to review judicial decisions. In *Burr v. Anglo-French Banking Corporation Ltd* [1933] 49 TLR 405 where Swift J, declared that a judgment of the Kings Bench was void because it had been made against a Chilean Corporation which had its charter of incorporation revoked so that for all intents and purposes it was non-existent. Swift J, was so bold when he indicated that the jurisdiction to declare a judgment a nullity existed whenever the court could determine that it was a nullity for fraud or otherwise without rehearing the facts. In *Ellerman Lines Ltd v. Read* [1927] 44 TLR 7 and affirmed as reported in [1928] 2 KB 144, where a judgment of a foreign superior court was adjudged invalid and inoperative because it was obtained through fraud. The court in *The Regina d'Italia* [1925] P 123 declared that a judgment for costs in an English Prize Court was enforceable in Gibraltar. It is now trite law that a judicial order made by a magistrate's court may be

reviewed just like any other order but this principle of review is constrained by Lord Goddard in *Pyx Granite Co Ltd v. Ministry of Housing and Local Government* [1960] AC 260, 290; [1959] 3 All ER 1, 8, where his Lordship rightly pointed out that the court will not ordinarily review by declaration the decision of a magistrate on a criminal case in lieu of appeal. The New Zealand Court even went to the extent of holding that the court will not interfere with a magistrate's exercise of jurisdiction in licensing matters: *Yukich v. Sinclair* [1961] NZLR 752. Lest I be accused of an oversight, I have not overlooked the case of *Johns v. Chatalos* [1973] 3 All ER 410 where Briglitman J, dismissed a claim for a declaration that a consent judgment in a county court was void as an unconscionable bargain, both on the merits and because prohibition was the appropriate remedy. Though the power of the court to make a declaratory order is unlimited in its scope, yet it is entirely discretionary in nature: *Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia & Anor* [1979] 2 MLJ 101 FC at p. 107 which followed *Ibeneweka v. Egbuna* [1964] 1 WLR 219 PC. per Viscount Radcliffe at p. 224; *Low Kum Yoon v. Teh Kim Huah* [1979] 1 MLJ 83; *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade* [1921] 2 AC 438; *Guaranty Trust Co v. Hannay* [1915] 2 KB 536; *Dyson v. Attorney-General* [1911] 1 KB 410 per Cozens-Hardy MR at p. 417; and *Hanson v. Radcliffe UDC* [1922] 2 Ch 507.

So much for the law.

Now, in prayer 3 of encl. 3, the plaintiff sought for the relief that RM1,594.74 sen utilised by the defendant through the use of the plaintiff's Southern Bank Berhad visa supplementary card be deducted from the defendant's share of the proceeds of sale of the matrimonial home. Indeed, the declaratory reliefs in prayers 1 and 2 of encl. 3 were perfectly drafted and when read in the context of *Vine v. National Dock Labour Board* [1957] AC 488, it can be lumped together with prayer 3 of encl. 3. In *Vine's* case (*supra*) the court there awarded damages in addition to a declaration that the dismissal of the plaintiff from work was illegal and void. In *Barber v. Manchester Regional Hospital Board* [1958] 1 WLR 181 damages from the board for wrongful dismissal and a declaration that the Minister of Health had broken his statutory duty were granted by the court. Seen in this context, prayer 4 of encl. 3 was rightly asked for by the plaintiff.

For the reasons aforesaid, I granted the prayers sought for in encl. 3.

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